Supreme Court, U.S.
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No. 98 - (1)

981607

In The

Supreme Court of the United States

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ELEASE AMOS-GOODWIN; ANN K. HEALEY; LONNIE W. JENKINS; KENNETH A. GREENE; SABRINA G. SMITH; THERESA A. WILLIAMS; EMMY BURNELL WILLIAMS; ANNA G. CARTER,

Petitioners,

v.

CHARLESTON COUNTY COUNCIL; COUNTY OF CHARLESTON; IRVIN CONDON, as Judge of the Probate Court for Charleston County,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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# PETITION FOR A WRIT OF CERTIORARI

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42PP

## QUESTION PRESENTED

DOES THE OPINION BELOW CONFLICT WITH THIS COURT'S PRIOR RULINGS ON THE RIGHTS OF PUBLIC EMPLOYEES TO BE FREE FROM "PATRONAGE FIRINGS?"

## PARTIES TO PROCEEDING

The Parties named in the caption, exclusive of the Honorable Ernest Finney, were Parties before the Court of Appeals. The Honorable Ernest Finney in his representative capacity, was dismissed by consent prior to the rendering of the original District Court order.

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Petitioners, former employees in the Probate Court for Charleston County, respectfully request that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

## OPINIONS BELOW

The opinion of the United States Court of Appeals is an unpublished opinion together with the unpublished Order of the United States District Court, and both are included in the Appendix to this Petition.

## STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit ("Court of Appeals") was entered on August 27, 1998. No Petition For Rehearing was filed in light of Rule IOP 40.1 of the Honorable Court of Appeals for the Fourth Circuit.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This Court has essentially held that public employees have protected interest in their public jobs even if they are employees at will, and this is a right protected by the First and Fourteenth Amendments to the United States Constitution. See also Rutan v. Republican Party, 110 S. Ct. 2729; Elrod v. Bums, 96 S. Ct. 2673.

## STATEMENT OF THE CASE

The fundamental question in this case is whether or not "at will" employment status of a public employee subjects them to patronage dismissal when they are not identified as policymakers.

This case was originally filed in the United States District Court below pursuant to Title 28, United States Code, Sections 1343 and 1331. These sections provide that the Federal Courts shall have original jurisdiction on an action to recover relief for deprivation of civil rights under color of law (Title 28 U.S.C. Section 1343) and the Court shall have jurisdiction of civil actions arising under the Constitution and/or laws of the United States (Title 28 U.S.C. Section 1343). Record, Vol. 1, at 9. The law of the United States, in particular, was Title 42, United States Code, Section 1983. Record, Vol. 1 at 9. These laws have been applied in similar cases of unconstitutional "patronage" firings. Rutan v. Republican Party, 110 S. Ct. 2729 and Elrod v. Burns, 96 S. Ct. 2673. The applicable United States constitutional provisions applicable are the First Amendment and the Fourteenth Amendment of the United States Constitution. These Plaintiffs were all employees within the Probate Court for Charleston County and/or were employees of Charleston County working in the Probate Court. They had worked with two Probate Judges prior to the Defendant Condon being elected. Those two prior judges were Democrats and the election of Defendant Condon was a partisan election. The Defendant Condon was a Republican and served notice prior to taking

office of the termination of ten employees. There was one Associate Judge terminated along with nine support personnel. Eight employees were African-American and one employee was white. These individuals, with the exception of the Associate Judge and one support person, make up the Plaintiffs. These Plaintiffs were denied any administrative due process and, in fact, were told they had no such rights. The Plaintiffs' actual political activity ranged from voting to working in the campaign of the then incumbent Democratic Probate Judge, as well as being a friend and supporter of a Democratic Probate Judge in Berkeley County.

This Honorable Appellate Court had jurisdiction of this matter pursuant to Title 28, United States Code, Sections 1291, 1294(1) and Rule 3 of the Rules of Appellate Procedure. This was because this was an Appeal from a Final Order of the United States District Judge granting Summary Judgment in favor of the Defendants.

The Appeal was timely in that the Order was dated September 15, 1997 with entry September 16, 1997, and the Notice of Appeal being filed September 24, 1997.

The decision of the Honorable Fourth Circuit was rendered and filed August 27, 1998.

## I. Statement of the Procedure

As outlined previously, this case was filed in the United States District Court by the Plaintiffs/Petitioners pursuant to the jurisdiction

previously set out. The pleadings were amended once prior to any response to the suit to add a Party Plaintiff.

The Defendant Condon responded by answer. The Defendant Charleston County and the Supreme Court of South Carolina answered by moving to dismiss. Discovery was commenced. Upon the full personnel records of the Plaintiffs being obtained, there was a dismissal of the Supreme Court as a Party Defendant. [The Supreme Court had been joined because of Article V of the South Carolina Constitution providing for a Unified Judicial System.]

While discovery was still pending, the Plaintiffs/Petitioners moved for Partial Summary Judgment and for leave to amend the pleadings.

The proposed amendment of the pleadings was to conform the pleadings to the facts uncovered by the discovery, and to add allegations of:

1. Civil Conspiracy
2. Acting Outside of Scope of Authority
3. That the Appellants were Employees of Charleston County

The Defendant Condon moved for Summary Judgment. Prior to discovery being completed, the Court set all Motions to be heard.

At the hearing, the Plaintiffs/Petitioners withdrew their Motions for Partial Summary Judgment in light of their Motion to Amend the Pleadings.

**The Motion to Amend the Pleadings was Granted**

After argument, the Court entered Summary Judgment and the Appeal followed in a timely fashion

## II. Statement of Facts

Until 1994 there had always been a Democratic Probate Judge in Charleston County.

In fact, it is uncontradicted that the Honorable Gus Peadman had been the only person to hold that position in the last half of this century until his retirement in 1990. In 1990, an African-American Associate Probate Judge, Bernard Fielding, won the election as Probate Judge, as a Democrat. In 1994 he was opposed by the Republican candidate, Irwin Condon, Esquire, who won the election. Subsequent to the election, the Defendant Condon set about organizing his term On New Year's Eve 1994, ten employees were served with a letter terminating their positions effective early January 1995. The Defendant Irwin Condon was sworn in on January 3, 1995 and promptly issued "commissions" to each of the Plaintiffs as "clerks." The Plaintiffs' terminations were completed and all were informed that there were no grievance procedures open to them by the County of Charleston Personnel Department. All attempted to gain employment in some fashion. After varying degrees of success and/or failure, this action was brought. When discovery was started, Plaintiffs' formal docu-

ments clearly labeled their employer as "Charleston County." It was also discovered that a Memorandum advising the Defendant Condon on "how to fire" the Plaintiffs was written by the County Administrator prior to Christmas 1994 and was circulated to all members of Charleston County Council. All Plaintiffs suffered damages from limited employment and extended unemployment, to extended under-employment and loss of pension and other benefits. One Plaintiff, Emmy Burnell-Williams, even testified to becoming suicidal upon notification of the termination of her long-time employment.

When the Defendant Probate Judge was originally asked why he had terminated the Plaintiffs, he stated publicly that he was entitled to his own "team."

## 1.

## THE PETITION SHOULD BE GRANTED BECAUSE THE OPINION BELOW CONFLICTS WITH THIS COURT'S PRIOR RULINGS ON THE RIGHTS OF PUBLIC EMPLOYEES TO BE FREE FROM "PATRONAGE FIRINGS."

The Plaintiffs/Petitioners' argument, while dependent on various legal and factual issues, is very simple.

1. The granting of Summary Judgment was clear error because it was based on a stipulation that **was never made**. To wit, the Court in its Order stated that the Plaintiffs stipulated that the Plaintiffs

were "clerks" within the definition of Title 14-23-1090 of the Code of Laws 1976 as amended. The actual record clearly reveals that the Plaintiffs stipulated that any "clerks" commissions were pursuant to Title 62-1-307.

2. The Court misapplied Title 62-1-307 S.C. Code of Laws 1976 as amended, in that there is a clear reporter's comment that this provision of Title 62 did **not** alter the provisions of Title 14-23-1090 of the Code of S.C. 1976 as amended. Record Vol II, Page 1108.

3. The Court erred in holding that these employees were neither ***de facto*** nor ***de jure*** employees of the County. Record Vol. II, Page 1108.

4. The Probate Judge was **not** the employer of the Plaintiffs.

**5. These Appellants had made out, to this point, a *prima facie* case that they were terminated for being "Democrats" and/or Democratic appointees.**

6. The employer **did not** show that the Appellants would have been fired in the absence of the protected activity.

7. The Court was in error in that the Appellants could not testify that Judge Condon definitely knew of their political beliefs in every case, but the facts and circumstances clearly could lead a jury, at that point, to conclude that they had been the victims of a "political patronage" firing.

8. The Court committed clear error in following the "class treatment" standard of Scott v. Haworth, 916 F. 2d 134 (4th Cir. 1990) in that these Appellants are individual Plaintiffs and this is **not** a class action.

9. The Court misapplied Title 4-9-30(7), Code of Laws of S.C. 1976, in dismissing the County.

## II. DISCUSSION OF ISSUES

### A. Law Applicable To All Issues.

Prior to addressing each issue, a review of the applicable law laid out initially would make a discussion of the specific issues easier to follow. Charleston County government operates under the provisions of the so-called Home Rule Act (Title 4-9-10 et seq. Code of Laws of S.C. 1976 as amended). Title 4-9-30(7) provides in reference to personnel systems that the County employees shall be regulated by policies and procedures. "This employment and discharge authority does not extend to any personnel employed in departments or agencies under the direction of an elected official ... "Title" 4-9-30(7) Code of Laws of 1976 as amended. The office of Probate Judge is an elected office. Title 14-23-1010 Code of Laws of S.C. 1976 as amended.

The South Carolina Constitution provides for the aforesaid "Home Rule" legislation as referenced in Title 4. Article VIII Section

1 et seq. South Carolina Constitution. However, that same Constitution provides:

***"In enacting provisions required or authorized by this Article general law provisions applicable to the following matters shall not be set aside:***

***"..... (4) The structure for and the administration of the State's Judicial System....."*** **Article VIII, Section 14 of the South Carolina Constitution. (Emphasis added.)**

Additionally, Article V, Section 12 of the State Constitution provides for a Probate Court system **"as the *General Assembly may provide, consistent with the provision of Section I of this Article."* Article V, Section 12 of the South Carolina Constitution. (Article V, Section I creates the Unified Judicial System.)**

With the foregoing in mind, one must examine the structure of the Probate Court System. Title 14-23-1010 et seq. of the Code of Laws of South Carolina 1976 as amended "sets up" the Probate Courts. This Title provides that the Probate Judge may appoint associate judges who serve at his pleasure providing "the governing body approves the funds therefor." Title 14-23-1030 Code of Laws of S.C. 1976 as amended.

The Probate Judge may provide for a Deputy Probate Judge to serve from time to time in his absence. Title 14-23-1070, Code of

Laws of S.C. 1976 as amended. Title 14-23-1090 provides that the Probate Judge may appoint a Clerk to serve at the Judge's pleasure. The only other statutory reference to any employees in the Probate Court is continued in Title 14-23-1130. It provides in part as follows:

***"In addition, the governing body of each County shall provide office space*** *and* ***additional support personnel*** ***necessary for the orderly conduct of the business of the Probate Court."*** **Title 14-23-1130, Code of Laws of S.C. 1976 as amended. (Emphasis added.)**

The Probate Judge argued that these employees were his "at will" employees. Without abandoning the factual argument reflected by the exhibits, and without abandoning the argument that Title 14-23-1130 clearly means these employees were "County employees," the Court's attention is drawn to the Constitution and statutes regarding the Probate Judge's powers over employees. The Supreme Court of South Carolina in the case of Heath v. Aiken, 368 S.E 2d 904, clearly held that the Sheriff had to be given clear statutory authority over employees other than deputies. Heath v. Aiken, 368 S.E. 2d 904 at Page 905. In fact, the case notes the Legislature amended the statutes to give the Sheriff at-will employment over all Sheriff's employees. Heath v. Aiken, supra, at Page 905, Footnote 2.

The Probate Court has been given explicit at-will employment of Associate Judges, Deputy Judges and the Clerk. Title 14-23-1030, 1070 and 1090. Code of Laws of S.C. 1976 as amended. Furthermore, the Legislature also empowered the Supreme Court to make rules for "...practice, procedure and conduct of business..." Title 14-23-1140, Code of Laws of S.C. 1976 as amended; S.C. Constitution, Article V, Section 12. Accordingly, under the rationale of Heath v. Aiken, it is clear that the Probate Judge can have only those employment powers given to him by statute and/or Rule of the Supreme Court.

Therefor the Probate Judge cannot be an at-will employer even if these employees were not "County employees."

All in all, it is crystal clear that these were not at-will employees. Furthermore, it is crystal clear that not one of these Plaintiffs was 'the Clerk' of the Probate Court. Title 14-23-1090 clearly says: ***The Judge of Probate may appoint a clerk and may remove him at his pleasure."*** Title 14-23-1090 Code of Laws of S.C. 1976 as amended. Title 14-23-1100 goes on to describe the duties of "the Clerk." Clearly these two statutes are in the singular.

The United States Supreme Court has held in political firings/patronage cases that the firing of a public employee can be actionable and that the constitutionally protected "right" sounds in the First Amendment to the United States Constitution. Rutan v. Re-

publican Party, 110 S. Ct. 2729; Elrod v. Burns, 96 S. Ct. 2673; Branti v. Finkel, 445 U.S. 507 (1980); Please see Extension to Private Contractors O'Hare Truck Service Inc. v. North Lake, _____U.S. _____ 1996, 95-191. Also see Chester v. Wise County (4th Cir.) 95-3092, Decided July 11, 1997.

The South Carolina Supreme Court has held that even an "at will" public employee may sue for a violation of a constitutional right. Botchie v. O'Dowd, 384 S.E. 2d 727 1989. Further, the State of South Carolina has enacted Title 16-17-560 as a public policy, and the State Supreme Court of South Carolina has provided that a private cause of action exists if proven. Culler v. Blue Ridge Electric Co-Op, 422 S.E. 2d 91.

Having the foregoing in mind, a discussion of specific issues can be addressed.

## I. THE HONORABLE COURT OF APPEALS ERRED BY SUSTAINING THE ENTRY OF SUMMARY JUDGMENT PRIOR TO THE CONCLUSION OF DISCOVERY.

The District Court had concluded that there does not exist any proof of the elements necessary for any theory of recovery at trial. It is important to recall that discovery had not been concluded. Accordingly, it would appear that the District Court overlooked a factor that the United States Supreme Court said must be

considered. Celotex Corp. v. Catreft, 477 U.S. 317 (1986). The logical question would be to ask: What has been shown? Additionally, what could be shown by further discovery?

First, what has the Plaintiffs' case presented?

1. The Plaintiffs all worked for a "Democratic" Probate Judge.

2. The Defendant Condon was elected as a Republican.

3. The Defendant Condon essentially "cleaned' out the Probate Court personnel.

4. Ms.. Alison Atwood, a niece of a sitting Republican member of County Council, was retained by the Defendant Condon.

5. Ms. Ann Healey had approached the Republican Clerk of Court prior to Judge Condon taking office and asked the Clerk of Court for Common Pleas to ask Judge-elect Condon if she should take the job offer from the Democratic Judge in Berkeley County. This information was communicated to Judge Condon,

6. There was uncontradicted testimony that the County maintained an alleged at-will employee on the payroll even after termination until they found him another job.

7. There was further uncontradicted testimony about unequal treatment of at-will employees by Charleston County.

8. The memorandum of the County Administrator to Judge Condon warning of dire consequences if he fired the

Plaintiffs was established.

Further discovery anticipated to flesh out the foregoing is very simple. The Clerk of Court for Charleston County, the Honorable Julie Armstrong, would confirm her contact on behalf of Ms. Healey and the passing of the message concerning Ms. Healey's offer from a Democratic judge. The County Administrator would have to explain the memorandum as well as all the exhibits showing the County as the employer. One must note that not a single Plaintiff has been identified as "the Clerk" of the Probate Court.

All in all, it is clear that the guidelines of the Celotex case have not been followed. Celotex Corp. v. Catrett, infra.

## II. THE HONORABLE COURT OF APPEALS ERRED IN FINDING THAT THE PLAINTIFFS HAD STIPULATED THAT THEY WERE THE AT-WILL EMPLOYEES OF THE DEFENDANT JUDGE AND SUBJECT TO TERMINATION AS "THE CLERK."

The District Court in its Order stated:

***"Plaintiffs admitted at oral argument that all of their commissions specifically cited 14-23-1090."***

However, the clear statement of the Plaintiffs was reflected in the transcript ..... ***they are not the Clerk of the Probate Court pursuant to 14-23-1090....."*** Record 1 Vol. I at page 42, Lines 3-

4, and see following Lines 5 through 12. Please see Record at Pages 644, 646 and 647 wherein the Commissions limit Ms. Jenkins to being a "Clerk of the Therapeutic Division."

Title 14-23-1090 clearly is worded in the singular. Title 14-23-1090, Code of Laws of S.C. 1976 as amended. Frankly, the said Section does **not** authorize the appointment of multiple "clerks." Furthermore, there may be a division of work for administrative purposes, but there is **no** statute or rule creating a "Therapeutic Division" of the Probate Court. Therefore, reading Title 14-23-1090 together with Title 14-1-40 means that there is only "one (1) Clerk.'

While the forms reference 14-23-1090, it is clear that the "authority" of the multiple "clerks" comes about as a result of Title 62-1-307 of the SC. Code which reads:

***"The acts and orders which this Code specifies as performable by the court may be performed either by the judge or by a person, including one or more clerks, designated by the judge by a written order filed and recorded in the office of the court."***

***"HISTORY: 1986 Act No. 539, Section 1."***

***"REPORTER'S COMMENTS***

***This section provides that the acts performable by the court may be performed by the probate judge or by a person, including a clerk, appointed by the judge. This section does not conflict with Section 14-23-1070 (appointment of a deputy), or 14-23-1090 (appointment of a clerk) of the 1976***

***Code, and these sections will still be applicable.***

***Cross references -***
***As to associate judges of probe, see Section 14-23-1030.***
***As to appointment of deputy by judge of probate, see Section 14-23-1070.***
***As to duties of clerk of probate court, see Section 14-23-1100."***

Title 62-1-307, Code of Laws of S.C. 1976 as amended. Clearly the Legislature did **not** expand the number of "at will' employees.

Therefore, the conclusion that all the Plaintiffs were "the Clerk" and at-will employees was clearly an erroneous conclusion.

Furthermore, even if they were "at-will" employees, they still have a right to sue. Please see Botchie v. O'Dowd, Infra.

## III. THE HONORABLE COURT OF APPEALS ERRED IN FINDING NO ISSUE OF EQUAL PROTECTION OF EVEN AT-WILL EMPLOYEES REMAINING.

Even if one concluded that the Court's analysis was correct on other issues, and the Appellants **do not** agree with that view, the Complaint clearly raises an equal protection claim. At no time did the Court address that issue. There had been uncontradicted testimony of unequal treatment of at-will employees submitted.

The Order of the Honorable District Court did not even address that cause of action.

## IV. THE HONORABLE COURT OF APPEALS ERRED IN UPHOLDING GRANTING SUMMARY JUDGMENT WHEN THERE WERE ISSUES OF FACT ESTABLISHED BY THE CASE.

What issues of fact were established and raised for a jury to consider?

Who is "The Clerk" of the Probate Court?

Why were the Petitioners fired?

Does the fact that they were fired without any review coupled with notice prior to the Republican judge being sworn in mean that they were fired for **not** being Republicans?

Why did the judge retain a niece of a sitting Republican County Council member?

These are simply a few of the issues of fact for a jury to consider and answer. In fact. the question of "Who was the employer?" is a valid issue for the jury. Despite "the law," the handling of these employees was such as to give a clear inference that they all were "County employees." If they were *de facto* County employees, then clearly they were fired illegally under color of law.

In short, the Petitioners met the tests outlined in Celotex. v. Catrett, Infra

## V. THE HONORABLE COURT OF APPEALS ERRED IN INTERPRETING THE APPLICABLE LAW, INCLUDING THE LAW OF THE SOVEREIGN STATE OF SOUTH CAROLINA AND CONCLUDING THAT THE LAW SUPPORTED THE GRANTING OF

**SUMMARY JUDGMENT.**

The Honorable District Court granted Summary Judgment, in large part, because the Plaintiffs were not able to say that they knew that Judge Condon knew of their Party affiliation or lack thereof. Judge Condon has said he wanted his "team" and that he did this for efficiency. Those are questions of fact.

In this case there was a "wholesale" replacement of the Appellants even before the Defendant Judge took office. The District Court entirely missed Justice Brennan's point that efficiency cannot ***"....validate patronage wholesale."*** Elrod v. Bums, 427 US. 347 at Page 367

Furthermore, this Court in applying the law and the "Mt. Healthy standards" clearly sets out that "credibility" is a jury question. E.g. Chester v. Wise County Electoral Board, Infra, at Page 12.

It is obvious that the District Court ruled on the "credibility" of the Defendant Judge and concluded that the "wholesale" discharge had no basis in the "political" process. Accordingly, we respectfully submit that the Court of Appeals Court misapplied Rutan, Elrod, Branti and Chester.

Furthermore, the Court of Appeals overlooked the fact and law that the provisions of Title 62-1-307 of the Code was **not** intended to modify or alter the provisions of Title 14-23-1090.

Furthermore, the Court ignored the State constitutional scheme for the Courts and Home Rule by giving the Court at-will employment over employees who were County employees. Title 14-23-1090, Heath v. Aiken, 368 S.E. 2d 904.

It goes without saying that the Court did not apply Celotex in the context of the facts and discovery had and which could be had in this case.

## CONCLUSION

This case presents a question of exceptional importance - whether or not the Court of Appeals can encode the prior rulings of this Court. By granting this Petition For Certiorari, this Court can correct the Fourth Circuit's decision which essentially ignores this Court's findings and holdings in similar patronage firing cases.

Accordingly, these Petitioners respectfully request that their Petition For Writ Of Certiorari be granted.

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Attorney for the Petitioners

Dated this 20th day of November, 1998
at Charleston, South Carolina.

JUDGMENT

UNITED STATES COURT OF APPEALS

for the

Fourth Circuit

FILED: August 27, 1998

NO. 97-232
CA-96-3725-2-23

ELEASE AhX~-GOODWIN: ANN K. HEALEY: LONNIE W. JENKINS; KENNETH A. GREENE: SABRINA G. SMITH; THERESA A. WILLIAMS; EMMY BURNELL WILLIAMS; ANNA G. CARTER

Plaintiffs - Appellants

V.

CHARLESTON COUNTY COUNCIL; COUNTY OF CHARLESTON; IRVIN
CONDON, as judge of the probate court for Charleston County

Defendants - Appellees

and

ERNEST FINNEY, in his representative capacity as Chief Justice of the South Carolina Supreme Court

Defendant

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Appeal from the United States District Court for the District of South Carolina at Charleston

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In accordance with the written opinion o£ this Court filed this day, the Court affirms the judgment of the District Court.

/s/ Pazzicia S. Connor
CLERK

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

ELEASE AMOS-GOODWIN; ANN K. HEALEY;
LONNIE W. JENKINS; KENNETH A. GREENE;
SABRINA G. SMITH; THERESA A. WILLIAMS;
EMMY BURNELL WILLIAMS; ANNA G. CARTER,

*Plaintiffs-Appellants,*

*V.*

CHARLESTON COUNTY COUNCIL;
COUNTY OF CHARLESTON; IRVIN CONDON,
as judge of the probate court for Charleston County,

*Defendants-Appellees,*

and

ERNEST FINNEY, in his representative
capacity as Chief Justice of the South
Carolina Supreme Court,

*Defendant.*

No. 97-2321

Appeal from the United States District Court
for the District of South Carolina, at Charleston.
Patrick Michael Dully, District Judge.
(CA-96-3725-2-23)

Submitted: June 9, 1998

Decided: August 27, 1998

Before NIEMEYER, HAMILTON, and WILLIAMS,
Circuit Judges.

Affirmed by unpublished per curiam opinion.

## COUNSEL

William L. Runyon, Jr., LAW OFFICES OF WILLIAM L. RUNYON, JR., Charleston, South Carolina, for Appellants. G. Mark Phillips, Joseph C. Wilson, IV, Molly Hood Craig, HOOD LAW FIRM, Charleston, South Carolina; Bruce E. Miller, James E. Reeves, BARNWELL, WHALEY, PATTERSON & HELMS, Charleston, South Carolina, for Appellees.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

## OPINION

PER CURIAM:

Appellants appeal the district court order granting summary judgment in favor of Judge Irvin Condon and granting the County of Charleston and County Council's motion to dismiss. Finding no error, we affirm.

Appellants are all Democrats who were discharged from their former employment with the Probate Court for the County of Charleston. Each of the Appellants was hired by former probate judges as a "clerk of the probate court," and their commissions specifically state:

> Pursuant to and by virtue of the power in us vested and conferred by Section 14-23-90 of the Code of Laws of South Carolina, 1976, .... we, [probate judge] and [associate probate judge], as Judge and Associate Judge of Probate of and for the County of Charleston do hereby appoint and commission [name] . . . as CLERK OF THE PROBATE COURT, Therapeutic Determination Division ....

After Judge Irvin Condon, a Republican, was elected, he terminated Appellants and placed several other clerks on probationary status. Appellants were informed that, as at-will employees of the probate judge and not of the County, they had no right to avail themselves of grievance procedures established for county employees.

Appellants brought the instant suit under 42 U.S.C. § 1983 (1994), contending that Defendants Judge Condon and the County and County Council deprived them of their constitutional rights under the First and Fourteenth Amendments, because they were terminated for being politically opposed to Judge Condon. Appellants also contended that they were deprived of participation in the grievance procedures established by the County.

The district court granted Judge Condon's motion for summary judgment, holding that Appellants were at-will employees of the probate judge, and that the probate judge had the authority to terminate them at will. The court further held that Appellants failed to present any evidence that their political beliefs were a motivating factor in their discharge. The court also granted the County and County Council's motion to dismiss, holding that because Appellants were employees of the probate judge and not of the County, the County had no authority over Appellants, and Appellants had no right to utilize County grievance procedures.

Appellants' commissions specifically state that they are hired as "clerks" of the probate court, and also reference S.C. Code Ann. § 14-23-1090, which states that "[t]he judge of probate may appoint a clerk and may remove him at his pleasure." S.C. Code Ann. § 14-23-1090 (Law. Co-op. 1976 & Supp. 1997). Accordingly, Appellants are clerks of the probate court, and thus at-will employees of the probate judge. *See* S.C. Code Ann. §§14-23-1090, 62-1-307 and cmt. (Law. Co-op. 1976); *see also* S.C. Code Ann. § 4-9-30(7) (Law. Co-op. 1976 & Supp. 1997) (authority of county government to employ and discharge county personnel does not extend to "any personnel employed in departments or agencies under the direction of an elected official"); *Heath v. Aiken County*, 368 S.E.2d 904, 905-06 (S.C. 1988); *Anders v. County Council for Richland County*, 325 S.E.2d 538, 539 (S.C. 1985); *Ludwick v. This Minute*, 337 S.E.2d 213, 214 (S.C. 1985).

Because Appellants are probate court employees, the County had no authority over Appellants, and thus could not have wrongfully ter-minated Appellants. *See* S.C. Code Ann. § 4-9-30(7); *Bales v. Aughtry,* 395 S.E.2d 177, 178 (S.C. 1990). Further, because Appellants were employees of an elected official, the probate judge, and were not county employees, they were not entitled to a grievance hearing under § 4-9-30(7). *See* S.C. Code § 4-9-30(7); 1988 S.C. Op. Atty. Gen. No. 88-68, 1988 WL 383551 (S.C.A.G. Sept. 14, 1988).

Appellants contend that Judge Condon terminated them due to their political affiliation, Democrat. However, Appellants did not make their political beliefs known to Judge Condon, nor did he have any reason to know of their political beliefs. There is no evidence in the record showing that Appellants' terminations were politically motivated. *See Mt. Healthy v. Doyle,* 429 U.S. 274, 287 (1977); *Elrod v. Burns,* 427 U.S. 347, 359-60 (1976); *Jones v. Dodson,* 727 F.2d 1329, 1335-36 (4th Cir. 1984); *Laskaris v. Thornburgh,* 733 F.2d 260, 265-66 (3rd Cir. 1984); *Pignato v. Virginia Dep't of Envtl. Quality,* 948 F. Supp. 532, 541-42 (E.D. Va. 1996). Appellants' claim on this ground must fail.

The district court properly granted summary judgment to Judge Condon, and properly granted the County and County Council's motion to dismiss. Accordingly, we affirm. We dispense with oral argument because the facts and legal contentions are adequately set out in the materials before the court and argument would not aid the decisional process.

*AFFIRMED*

AO 450 (Rev. 5/85) Judgment in a Civil Case

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

ELEASE AMOS-GOODWIN,
ANNA G. CARTER, ANN K. HEALEY,
LONNIE W. JENKINS, KENNETH A. GREENE,
SABRINA G. SMITH, THERESA A. WILLIAMS,
AND EMMY BURNELL WILLIAMS,
Plaintiffs,

VS.

CHARLESTON COUNTY COUNSEL, COUNTY OF CHARLESTON, AND THE HONORABLE IRVIN CONDON AS JUDGE OF THE PROBATE COURT FOR CHARLESTON COUNTY,
Defendants.

**JUDGMENT IN A CIVIL CASE**

Case Number: 2:96-3725-23

( ) Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

(x) Decision by Court. This action came to trial or hearing before the Court. The issues have been duly heard and a decision has been duly rendered.

IT IS ORDERED AND ADJUDGED that plaintiffs' motion for partial summary judgment is denied; that defendant Judge Irvin Condon's motion for summary judgment is granted; and that defendants Charleston County and Charleston County Council's motion to dismiss is granted.

LARRY W. PROPES, Clerk
By_____ September 16, 1997
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

ELEASE AMOS-GOODWIN, ANNA G. CARTER, ANN K. HEALEY, LONNIE W. JENKINS, KENNETH A. GREENE, SABRINA G. SMITH, THERESA A. WILLIAMS, AND EMMY BURNELL WILLIAMS,

Plaintiffs,

v.

CHARLESTON COUNTY COUNSEL, COLrNTY OF CHARLESTON, AND THE HONORABLE IRVIN CONDON AS JUDGE OF THE PROBATE COURT FOR CHARLESTON COUNTY,

Defendants.

ORDER

CIVIL ACTION NO. 2:96-3725-23

This matter is before the court on plaintiff's motion for partial summary judgment, defendant Probate Judge Irvin Condon's motion to dismiss and motion for summary judgment and on defendants Charleston County Council's ("County Council") and County of Charleston's ("the County") motion to dismiss. The court heard argument on all motions on July 31, 1997.

## I. BACKGROUND

Plaintiffs were all employed by the Probate Court. In November 1994, Judge Condon was elected Probate Judge. Upon taking office, Judge Condon discharged plaintiffs, all of whom were hired by previous probate judges. Judge Condon informed plaintiffs that they were employees at-will and therefore were not entitled to a grievance procedure.

Plaintiffs commenced this action against the defendants on December 13, 1996, alleging violations of First Amendment rights, 42 U.S.C. § 1983, and South Carolina public policy.

## II. SUMMARY JUDGMENT STANDARD

To grant a motion for summary judgment, this court must find that "there is no genuine issue as to any material fact." Fed. R. Civ. P. 56(c). The judge is not to weigh the evidence, but rather to determine if there is a genuine issue for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). If no material factual disputes remain, then summary judgment should be granted against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case and on wb.ich the party bears the burden of proof at trial. Celotex Corp. v. Catrett, 477 U.S. 317 (1986). All evidence should be viewed in the light most favorable to the nonmoving party. Perini Corp. v. Perini Constr., Inc., 915 F.2d 121,123-24 (4th Cir. 1990). "[W]here the record taken as a whole could not lead a

rational trier of fact to find for the non-moving party, disposition by summary judgment is appropriate." Teamsters Joint Council No. 83 v. CenTra. Inc., 947 F.2d 115, 119 (4th Cir. 1991). "IT]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trail." Celotex, 477 U.S. at 322. Finally, the "obligation of the nonmoving party is 'particularly strong when the nonmoving party bears the burden of proof.'" Hughes v. Bedsole., 48 F.3d 1376, 1381 (4th Cir. 1995) (quoting Pachalv v. City of Lvnchburg, 897 F.2d 723,725 (4th Cir. 1990).

## III. ANALYSIS

### A. Judge Condon's Motion for Summary Judgement

Judge Condon argues that he is entitled to summary judgment because plaintiffs were all at-will employees of the probate court. Plaintiffs dispute this argument and claim that they were employees of the County, and thus entitled to access to the County's grievance procedure. They further allege that even if they were not County employees, they were terminated because of their political beliefs in violation of their First Amendment rights. There are three critical issues to be decided: (1) Who employed plaintiffs?; (2) Were plaintiffs at-will employees?; and (3) Were plaintiffs terminated because of their po-

litical affiliation?

As to the first issue, plaintiffs contend that they were employees of the County, and thus entitled to the County's grievance procedures. Defendants claim, however, that plaintiffs were employees of the probate court.

Judge Condon argues that all plaintiffs were commissioned as clerks of the probate court pursuant to S.C. Code Ann, §14-23-1090 (Law. Co-op. 1976), which provides: "The judge of probate may appoint a clerk and my remove him at his pleasure." All plaintiffs were commissioned clerks of the probate court as evidenced by the formal commissions, recorded by book and page number, in the Charleston County Clerk of Court's office. Plaintiffs admitted at oral argument that all of their commissions specifically cited § 14-23-1090.[1]

Plaintiffs argue that they were not clerks because § 14-23-1090 is worded in the singular, and thus, there can be only one clerk. This argument is undercut, however, by S.C. Code Ann. § 62-1-307 (Law. Co-op. 1976), which provides:

> The acts and orders which this Code specifies as performable by the court may be performed either by the judge or by a person, including one or more clerks, designated by the judge by a written order filed and recorded in the office of the court. (emphasis added).

[1]The actual commissions for plaintiffs Lonnie W. Jenkins, Kenneth A. Greene, and Emmy Burnell-Williams are part of the record.

Clearly the legislature envisioned a situation where more than one clerk could be appointed. Since the prior probate judges specifically referenced § 14-23-1090 in the commission papers of all plaintiffs, this court is of the opinion that the only reasonable inference to be drawn is that all plaintiffs were clerks pursuant to § 14-23-1090, and therefore employees of the probate court.

Plaintiffs also argue that they fall under S.C. Code Ann. § 14-23-1130 (Law. Co-op. 1976), which provides in relevant part: "... In addition, the governing body of each county shall provide office space and additional support personnel necessary for the orderly conduct of the business of the probate court. "This argument is without merit because the plaintiffs were appointed by probate judges and not supplied by the county.

Judge Condon next contends that because plaintiffs were employees of the probate court pursuant to § 14-23-1090, they were at-will employees pursuant to the statute and under the common law doctrine of employment at-will. Sheale v. Fowler, 188 S.E. 499 (S.C. 1936). The court agrees. The statute specifically states that a clerk may be removed at the pleasure of the probate judge. Under the employment at-will doctrine, employment is deemed to be terminable by either party at any time and for any reason or for no reason at all. Shealy, 188 S.E. 499; Todd v. South Carolina Farm Bureau Mut. Ins., 278 S.E.2d 607 (S.C. 1981). A presumption of at-

will employment still exists in South Carolina. Ludwick v. This Minute Carolina. Inc., 337 S.E.2d 213 (S.C. 1985). In this case no plaintiff had an employment contract. Furthermore, the grievance procedure section of the employee handbook (which was distributed by Charleston County and issued to all Probate Court Employees), placed all employees on notice that they are at-will employees. Accordingly, Judge Condon had the authority to terminate plaintiffs at will.

Plaintiffs further allege that they were terminated for their political beliefs. Despite the court's conclusion that all plaintiffs were at-will employees, a public employee cannot be discharged because of his or her political affiliation. This would be a violation of the employee's First Amendment rights to freedom of association and freedom of belief. Elrod v. Bums, 427 U.S. 347 (1976); Branti v. Finkel, 445 U.S. 507 (1980). Courts utilize a two-part test for analyzing discharge cases involving a constitutionally protected right. First the employee bears the burden of establishing causation by proving that the protected activity was a motivating factor or played a substantial role in the discharge. Mt Healthy City School District Bd. Of Educ. V. Doyle 429 U.S. 274 (1977); Hall v. Marion School Dist. No. 2, 31 F.3d 183, 193 (4th Cir. 1994). If the employee/claimant is able to meet this burden, the employer must then show that it would have fired the employee even in the absence of the protected activity. Mt. Healthy, 429 U.S. at 287.

Judge Condon moved for summary judgment based upon

the deposition testimony in which each plaintiff testified that he or she did not make his or her political beliefs known to Judge Condon and that Judge Condon did not have any reason to know of their political beliefs beliefs.[2] Plaintiffs have not produced any evidence that their political beliefs were the motivating factor in their discharge or that these beliefs played a substantial role in the discharges.

[2]In the 1994 Probate Court election, Judge Condon's opponent was former Judge Bernard R. Fielding. PlaintiffAmos-Goodwin testified that shedidnot participate in Judge Fielding's re-election campaign (Exhibit 2A, pp. 51 and 67) and that her political views were never made known to Judge Condon (Exhibit 2A, pp. 67-68). Plaintiff Carter never discussed her political beliefs with any person (Exhibit 3A, pp. 7-9) and she did not participate in Judge Fielding's re-election campaign (Exhibit 3A, p.7-9). Plaintiff Healey does not consider hersella political person, and she does not know that her political beliefs were ever communicated to Judge Condon. She did not participate in the 1994 Probate Court election (Exhibit 4A, pp. 17-20). Plaintiff Jenkins never saw Judge Condon at any campaign event during the 1994 Probate Court election and therefore never communicated her political beliefs to Judge Condon (Exhibit 5A, pp. 21-22 and 49). Plaintiff Greene is not aware of anyone who has ever communicated his political beliefs to Judge Condon (Exhibit 6A, p.25) and he did not participate in Judge Fielding's re-election campaign with the single exception of putting up signs at the request of Fielding's funeral home (Exhibit 6A, p.25). Plaintiff Smith never communicated any of her thoughts on politics to Judge Condon (Exhibit 7A, p.26). Plaintiff Williams specifically testified that she never communicated her political beliefs to Judge Condon (Exhibit 8A, p.16-17, 40, 69) or to any person (Exhibit 8A, p.69), that she is not a political person (Exhibit SA, p. 17 and 69), that she did not participate in Judge Fielding's campaign, and that she does not know the political affiliation of her replacement (Exhibit 8B). PlaintiffBumell-Williams never met Judge Condon before his election (Exhibit 9A, p. 10), never saw him at any campaign event (Exhibit 9A. p.10-11), never expressed her political beliefs to Judge Condon (Exhibit 9A, p.10), and only participated in Judge Fielding's campaign after hours (Exhibit 9A, p. 11).

Further, Judge Condon stated in his interrogatory responses that he did not know any of plaintiffs' political affiliations, nor did he know the political affiliation of the six retained probate court employees who had been appointed by previous probate judges.

This case is therefore not one of political patronage. Addressing a political patronage class action brought in North Carolina against several elected officials, Judge Russell wrote that "[t]he teaching *of Elrod-Branti* then, is that mere allegation of political patronage dismissal falls short of stating a cause of action capable of class treatment. The inquiry must focus on the claim of the individual." Stott v. Haworth, 916 F.2d 134, 141 (4th Cir. 1990).

In this case, plaintiffs have failed to make a showing sufficient to establish that their First Amendment rights were violated. Therefore, pursuant to Rule 56(c), the court finds that there is no genuine issue of material fact and that Judge Condon is entitled to judgment as a matter of law. [3]

B. The County's and County Council's Motion to Dismiss

The County and County Council contend that they could not have wrongfully terminated the plaintiffs because they had no authority over plaintiffs. The court agrees, having decided that plaintiffs were

[3]South Carolina courts have held that, where a claimant has redress through a Section 1983 action, there can be no cause of action grounded on a South Carolina public policy violation. Epps v. Clarendon County, 405 S.E.2d 386, 387 (S.C. 1991).

employees of the probate court. S.C. Code Ann. § 4-9-30(7)(Law. Co-op. 1976), as amended in 1988, provides in relevant part:

[E]ach county government within the authority granted by the Constitution and subject to the general law of this State shall have the following enumerated powers which shall be exercised by the respective governing bodies thereof:

(7) to develop personnel system policies and procedures for county employees by which all county employees are regulated **except those elected directly by the people,** and to be responsible for the employment and discharge of county personnel in those eonnty departments in which the employment authority is vested in the county government. This **employment and discharge authority does not extend to any personnel employed in departments or agencies under the direction of an elected official or an official appointed by an authority outside county government.** (Emphasis added)

The South Carolina Supreme Court has held that "[t]he plain language of the statute limits the county govemment's power to employ or discharge elected officials or those under their direction..." Bales v. Aughtry 395 S.E.2d 177 (S.C. 1990).

Furthermore, this statute also bars such employees' access to the County's grievance procedures. See 1988 Op Atty Gert, No. 88-68, p 199 (No employee of an elected official, such as a sheriff, who is discharged by such official, is entitled to a grievance hearing

under Section 4-9-30(7)); see also Jones v Gilstrap, 343 SE2d 646 (S.C. Ct. App.1986).

Accordingly, plaintiffs have failed to state a claim upon which relief can be granted, and defendants' motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) is granted.

## CONCLUSION

It is therefore ordered, for the foregoing reasons, that plaintiffs' motion for partial summary judgment is **DENIED**; that defendant Judge Irvin Condon's motion for summary judgment is **GRANTED**; and that defendants Charleston County and Charleston County Council's motion to dismiss is **GRANTED.**

**AND IT IS SO ORDERED.**

PATRICK MICHAEL DUFFY
UNITED STATES DISTRICT JUDGE

September 12, 1997

Charleston, South Carolina

FILED
MAY 6 1999
OFFICE OF THE CLERK

No. 98-1607

In the

# Supreme Court of the United States

October Term, 1998

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ELEASE AMOS-GOODWIN; ANN K. HEALEY; LONNIE W. JENKINS; KENNETH A. GREENE; SABRINA G. SMITH; THERESA A. WILLIAMS; EMMY BURNELL WILLIAMS; ANNA G. CARTER,

*Petitioners,*

*v*

CHARLESTON COUNTY COUNCIL; COUNTY OF CHARLESTON; IRVIN CONDON, as Judge of the Probate Court for Charleston County,

*Respondents.*

*On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit*

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## BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED FOR REVIEW

I. WAS THE DISTRICT COURT CORRECT IN DISMISSING CHARLESTON COUNTY FROM THIS WRONGUL DISCHARGE ACTION WHEN, AS A MATTER OF LAW, THE PLAINTIFF WERE EMPLOYEES OF THE PROBATE JUDGE, NOT THE COUNTY?

II. DID DEFENDANT CONDON'S TERMINATION OF THE PLAINTIFFS VIOLATE ANY OF THEIR CONSTITUTIONAL RIGHTS?

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## STATEMENT OF THE CASE

The Plaintiffs were commissioned as Clerks of the South Carolina Probate Court "[p]ursuant to and by virtue of the power in us vested and conferred by Section 14-23-90 of the Code of Laws of South Carolina, 1976". Commissions, SJA 24 - 36.[1] Section 14-23-90 provides that clerks of the Probate Court serve and may be removed at the pleasure of the Probate Judge. S.C. Code Ann. § 14-23-90 (1976).[2] The Plaintiffs had been hired by former Probate Court Judges Gus Pearlman and Bernard Fielding. Plaintiffs have not alleged or presented any evidence that they had employment contracts.

When Defendant Condon was elected to the office of Probate Judge of Charleston County he sought the advice of E.E. Fava, Charleston County Administrator, regarding the status of these employees. Mr. Fava advised Defendant Condon that the Plaintiffs were at-will employees, and the decision as to whether or not to retain them rests entirely with Defendant Condon as the elected official. Memorandum from E.E. Fava to Defendant Condon, SJA 66 - 67.

---

[1] The actual commissions of Plaintiffs Lonnie Jenkins, Kenneth Greene, and Emmy Burnell-Williams were found in their personnel files. The personnel files of the remaining five Plaintiffs have disappeared from the probate court since the terminations. However, the book and page number from the Charleston County Clerk's Office shows the signature and dates of inception and expiration of the commissions for the other Plaintiffs. SJA 33 - 36. Plaintiffs admitted that there was no difference in their status. July 31, 1997 Hearing Transcript, JA page 41, line 21 - page 42, line 1.

[2] Section 14-23-90 was recodified as section 14-23-1090 in 1976. S.C. Code Ann. § 14-23-1090 (Supp. 1998).

Relying on Mr. Fava's advice and section 14-23-1090 of the South Carolina Code, Defendant Condon terminated the employment of the Plaintiffs with the Probate Court. Defendant Condon was unaware of any campaign efforts or political beliefs of the Plaintiffs and, therefore, could not possibly have terminated them for political reasons. Answers to Interrogatories, SJA 3; Verification of Answers to Interrogatories, SJA 143 - 144. These are the only relevant facts that appear on the Record.

Plaintiffs filed a complaint arising out of the termination on December 13, 1996. Docket, JA 4. The complaint was amended on December 20, 1996. Docket, JA 4. The Amended Complaint alleged that Plaintiffs were employees of the State of South Carolina and/or the Probate Court for Charleston County, South Carolina, a political subdivision of the State. Plaintiffs were allegedly terminated from these positions by Defendants due to their political opposition to Defendant Condon, the newly elected Probate Court Judge. Plaintiffs alleged that this was a violation of their rights under the First and Fourteenth Amendments of the United States Constitution and the "public policy" of South Carolina. Amended Complaint, JA 9-14.

After obtaining an extension of time in which to answer, Defendant Condon answered and moved to dismiss the Amended Complaint on February 12, 1997. Docket, JA 5. Defendant Condon asserted a general denial and motions to dismiss based on the fact that Plaintiffs were at-will employees, their termination was not violative of their constitutional rights or South Carolina public policy, and the action was barred by the South Carolina Tort Claims Act, South Carolina Code § 15-78-70(a) and (b) (Supp. 1998). Answer and Motion to Dismiss of Defendant Condon, JA 16A-16F. On

July 28, 1997 Defendant Condon provided the District Court judge with a memorandum in support of the motion to dismiss or, in the alternative, for summary judgment. Defendant Condon's Memorandum, Supplemental Joint Appendix Page ("SJA") 57 - 142.[3]

On February 12, 1997, Defendant Charleston County moved to dismiss for a failure to state a claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure. Docket, JA 5; Motion to Dismiss of Defendants Charleston County Council and Charleston County, JA 16I-16H.

In April of 1997, each of the Plaintiffs were deposed. Their testimony showed that Defendant Condon never discussed the Plaintiffs' political affiliations or beliefs prior to their termination. Deposition of Amos-Goodwin, JA 151, lines 3 - 6, JA 167, Lines 7 - 18; Deposition of Carter, JA 400, line 25 - JA 401, line 6, JA 403, lines 13 - 25; Deposition of Healey, JA 852, lines 21 - 24, JA 855, lines 4 - 7; Deposition of Jenkins, JA 588, lines 2 - 3, lines 20 - 25; Deposition of Greene, JA 984, line 17 - JA 985, line 7; Deposition of Smith, JA 340, lines 11 - 18; Deposition of Theresa Williams, JA 242, line 12 - JA 243, line 1; Emmy Burnell Williams, JA 675, lines 2 - 23.

In addition, in his verified Answers to Interrogatories, Defendant Condon stated that he was "unaware of any campaign efforts on the part of the Plaintiffs." Answers to Interrogatories, SJA 3; Verification of Answers to Interrogatories, SJA 143 - 144. Thus, there is no conflict in the testimony on this issue.

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[3] This memorandum is not noted in the Docket because it was provided directly to the Judge. As indicated on the first page of the memorandum, it was stamped by the Court to reflect the date that it was filed. SJA 57.

On July 31, 1997, a hearing was held on the Defendants' motions to dismiss. The District Court converted Defendant Condon's motion to dismiss to a motion for summary judgment without objection. Docket, JA 7; July 31, 1997 Hearing Transcript, JA 30, lines 17-20. At no time before or during the hearing did the Plaintiffs seek a continuance or indicate that further discovery was necessary.

By order dated September 15, 1997 and entered September 16, 1997 the District Court granted Defendant Condon's motion for summary judgment and Defendant Charleston County's motion to dismiss. Docket, JA 8; Order, JA 1095-1103. This appeal followed.

## SUMMARY OF ARGUMENT

Each of the Plaintiffs were commissioned as clerks for the probate judge, Defendant Condon, and were at-will employees of Defendant Condon, not Charleston County. S.C. Code Ann. § 14-23-1090 (1997). Thus, the County could not have wrongfully discharged persons that were not its employees.

In addition, Plaintiffs have failed to present any evidence linking their termination to the exercise of any protected constitutional rights. All Plaintiffs testified that they did not inform Defendant Condon of their political beliefs and that they did not know if Defendant Condon was aware of their political beliefs. Because Defendant Condon was not even aware of the Plaintiffs' political beliefs, he could not have terminated them for those purported beliefs. Thus, Plaintiffs have presented no evidence showing a causative link between the termination and the exercise of political

rights, a necessary element to any patronage case. *Board of County Comm'n, Wabaunsee County v. Umbehr*, 518 U.S. 668, 674-75, 116 S.Ct. 2342, 2347 (1996); *O'Hare Truck Service, Inc. v. City of Northlake*, 518 U.S. 712, 725, 116 S.Ct. 2353, 2360-61 (1996); *Mt. Healthy City School Dist. Bd. Of Ed. v. Doyle*, 429 U.S. 274, 287, 97 S.Ct. 568, 576 (1977).

## ARGUMENT

I. THE DISTRICT COURT WAS CORRECT IN DISMISSING CHARLESTON COUNTY FROM THIS WRONGFUL DISCHARGE ACTION WHEN, AS A MATTER OF LAW, THE PLAINTIFFS WERE EMPLOYEES OF THE PROBATE JUDGE, NOT THE COUNTY.

The dismissal of Charleston County Council and the County of Charleston was not in error because the judge, not the County, was the Petitioners' employer. It is undisputed Petitioners received their commissions as clerks of the probate court from the former Probate Judge, the Honorable Bernard Fielding, pursuant to South Carolina Code § 14-23-1090. That provision states the following: "The Judge of Probate may appoint a clerk and may remove him at his pleasure." The clear language of this statute indicates the Petitioners, as clerks of the probate court, were appointed and removed, not by the County, but by an elected official, the probate judge.

Any position based on the argument that § 14-23-1090 provides for only one probate court clerk, and, thus, the probate judge had no employment powers to appoint more than one clerk under *Health v. County of Aiken*, 295

S.C. 416, 368 S.E.2d 904 (1988), is clearly negated by South Carolina Code § 62-1-307. That section provides the following: "The acts and orders which this code [the probate code] specifies as performable by the Court may be performed by either a judge or by a person, **including one or more clerks**, designated by the judge by a written order filed and recorded in the office of court." S.C. Code Ann. § 62-1-307 (1987) (emphasis added). The Petitioners' commissions clearly cite § 14-23-1090 and were filed with the court as set forth in § 62-1-307. The comments to § 62-1-307 answer the question of any perceived conflict between these two sections:

> "This section does not conflict with . . . 14-23-1090 (appointment of a clerk) of the 1976 Code, and these sections will still be applicable."

That § 14-23-1090 only authorizes the probate judge to appoint one clerk is not supported by the overall structure of the probate court or by the comments explaining other relevant sections, such as § 62-1-307. The statutes permit the probate judge to appoint more than one clerk and to remove any or all of those clerks at will.

Those persons appointed by elected officials, such as the probate judge, are routinely treated separately from county employees. For example, the laws of South Carolina include this provision:

> [E]ach county government within the authority granted by the constitution and subject to the general law of this State shall have the following enumerated powers which shall be

> exercised by the respective exercising bodies thereof:
>
> . . .
>
> (7) To develop personnel system policies and procedures for county employees by which all county employees are regulated except those elected directly by the people . . . .

S.C. Code Ann. § 4-9-30(7) (Supp. 1998) (emphasis added). As employees of an elected official, the probate judge, the Petitioners were not subject to county personnel policies and procedures and were not employees of the County.

Whether the Petitioners were employees of the County or the probate judge is purely a question of state law. Such a dispute over this issue does not warrant review by this Court, particularly where the undisputed evidence clearly supports the lower court decisions that the Petitioners were appointed by the probate judge and worked solely at the will of the probate judge pursuant to his authority under § 14-23-1090.

## II. DEFENDANT CONDON'S TERMINATION OF THE PLAINTIFFS DID NOT VIOLATE ANY OF THEIR CONSTITUTIONAL RIGHTS.

### A. PLAINTIFFS WERE EMPLOYEES AT-WILL.

Plaintiffs have not alleged or presented any evidence that they had an employment contract. Under South Carolina's employment at-will doctrine, employment for an

indefinite period of time without a specific contract of employment is deemed to be terminable by either party at any time and for any reason or for no reason at all. *E.g.*, *Todd v. South Carolina Farm Bureau Mut. Ins.*, 276 S.C. 284, 278 S.E.2d 607 (1981); *Ross v. Life Ins. Co. of Virginia*, 273 S.C. 764, 259 S.E.2d 814 (1979).

Even more significant is the fact that the Plaintiffs' status as employees at-will is codified by statute. South Carolina Code § 14-23-1090 states that "[t]he judge of probate may appoint a clerk and may remove him at his pleasure." As argued above, all of the Plaintiffs are "clerks". Thus, as a matter of law, they are employees at-will that may be terminated for any reason or no reason at all.

B. PLAINTIFFS WERE NOT TERMINATED IN VIOLATION OF THEIR CONSTITUTIONAL RIGHTS.

Of course, even an at-will employee cannot be fired for his or her political beliefs. *Branti v. Finkel*, 445 U.S. 507, 513-16, 100 S.Ct. 1287, 1292-93 (1980); *Elrod v. Burns*, 427 U.S. 347, 359-60, 96 S.Ct. 2673, 2683 (1976); *Perry v. Sindermann*, 408 U.S. 593, 597-98, 92 S.Ct. 2694, 2697-98 (1972). As a first step for showing an unconstitutional "patronage" claim, the employee must prove that political or other protected activity was a substantial or motivating factor in the discharge. *Board of County Comm'n, Wabaunsee County v. Umbehr*, 518 U.S. 668, 674-75, 116 S.Ct. 2342, 2347 (1996); *O'Hare Truck Service, Inc. v. City of Northlake*, 518 U.S. 712, 725, 116 S.Ct. 2353, 2360-61 (1996); *Mt. Healthy City School Dist. Bd. Of Ed. v. Doyle*, 429 U.S. 274, 287, 97 S.Ct. 568, 576 (1977); *Sales v. Grant*, 158 F.3d 768, 779 (4th Cir. 1998).

Plaintiffs here have utterly failed to present any evidence showing this requisite causal link between their political beliefs and the terminations. Judge Condon's verified discovery responses state that he "did not and could not have known of [the Plaintiffs'] political beliefs". Answers to Interrogatories, SJA 3; Verification of Answers to Interrogatories, SJA 143 - 144. In addition, each Plaintiff testified at their depositions that they did not make their political beliefs known to Judge Condon and that Judge Condon did not have any reason to know of their political beliefs. Deposition of Amos-Goodwin, JA 151, lines 3 - 6, JA 167, Lines 7 - 18; Deposition of Carter, JA 400, line 25 - JA 401, line 6, JA 403, lines 13 - 25; Deposition of Healey, JA 852, lines 21 - 24, JA 855, lines 4 - 7; Deposition of Jenkins, JA 588, lines 2 - 3, lines 20 - 25; Deposition of Greene, JA 984, line 17 - JA 985, line 7; Deposition of Smith, JA 340, lines 11 - 18; Deposition of Theresa Williams, JA 242, line 12 - JA 243, line 1; Emmy Burnell Williams, JA 675, lines 2 - 23.

Because all evidence shows that Defendant Condon was unaware of the Plaintiffs political beliefs, he could not possibly have terminated them for those beliefs. Plaintiffs have presented no evidence of causation. Moreover, because all witnesses are in agreement on this point, there is no question of credibility.

Because Plaintiffs have failed to present any evidence that their termination was politically motivated, Defendant Condon is entitled to summary judgment on their constitutional claims.

## C. PLAINTIFFS CANNOT RELY ON SOUTH CAROLINA PUBLIC POLICY TO CONTEST THEIR TERMINATION.

Plaintiffs also alleged in their Amended Complaint that their termination violated South Carolina public policy. South Carolina recognizes that the termination of an at-will employee in violation of a clear mandate of public policy gives rise to an action in tort for wrongful discharge. *Ludwick v. This Minute of Carolina, Inc.*, 287 S.C. 219, 337 S.E.2d 213, 216 (1985). However, the South Carolina Supreme Court has explicitly ruled that the public policy exception to the employee at-will doctrine does not apply where the employee has an existing remedy. *Epps v. Clarendon County*, 304 S.C. 424, 405 S.E.2d 386, 387 (1991). When the employee already has an action under 42 U.S.C. § 1983, there is no tort action available. *Id.*

Even if the Plaintiffs did have an action under South Carolina tort law, their claim still fails due to the complete lack of evidence linking their political beliefs to the decision to terminate. Causation is, of course, a necessary element of any tort claim, including one for wrongful termination. *See Culler v. Blue Ridge Electric Cooperative, Inc.*, 309 S.C. 243, 422 S.E.2d 91, 93 (1992).

## D. PLAINTIFFS DID NOT REQUEST A CONTINUANCE AND, THEREFORE, CANNOT NOW ASSERT THAT THEY NEEDED ADDITIONAL DISCOVERY.

Plaintiffs argue that the Court of Appeals should have reversed the District Court's order on the grounds that they needed to conduct additional discovery. Plaintiffs also

contended that summary judgment was granted even though discovery was pending. Petition for Writ of Certiorari, Page 4. Plaintiffs, however, fail to identify anything in the record supporting this argument.

The record contains neither "pending discovery" nor any indication that Plaintiffs sought a continuance from the District Court to conduct additional discovery. Indeed, counsel for Plaintiffs admitted at the hearing on this matter that their motion to amend did not "have an impact on discovery, rebriefing or what have you." July 31, 1997 Hearing Transcript, JA 31, lines 6-9.

It is well-settled that the Court of Appeals will not address issues not raised in the lower court. *Domino Sugar Corp. v. Sugar Workers Local Union 392*, 10 F.3d 1064 (4th Cir. 1993); *Davis v. City of Chicago*, 841 F.2d 186 (7th Cir. 1988). Because Plaintiffs did not request a continuance and the District Court never ruled on this issue, the Court of Appeals properly refused to address same.

## CONCLUSION

Defendants would respectfully request that the Supreme Court deny Plaintiffs' petition for a writ of certiorari.

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